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5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ANIMAL LEGAL DEFENSE FUND,

9 Plaintiff,

10 v.

11 OLYMPIC GAME FARM, INC., *et al.*,

12 Defendants.
13

CASE NO. 3:18-cv-06025-RSL

ORDER GRANTING IN PART
DEFENDANTS' *DAUBERT* MOTION

14 This matter comes before the Court on defendants' "Motion to Exclude Expert
15 Testimony." Dkt. # 142. Defendants seek to exclude the testimony of Dr. Valerie Johnson
16 regarding wolf pups born in 2010 on relevance and/or *Daubert* grounds, the testimony of
17 Dr. Lisa Harrenstien as speculative, duplicative, and/or untimely, the testimony of Dr.
18 Jennifer Ward as speculative and/or duplicative, and the testimony of Dr. Sarah Owens as
19 unhelpful.¹
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25 ¹ Plaintiff no longer intends to present the opinions or testimony of Dr. Adam Freedman or Dr. Bridgett vonHoldt,
26 and the Court has therefore not considered defendants' objections thereto. *See* Dkt. # 274. Plaintiff has also withdrawn
Dr. Johnson's testimony regarding the proper characterization of Olympic Game Farms' bears and wolves, making a
Court ruling on its admissibility unnecessary. *Id.*; Dkt. # 168 at 10, n. 5.

1 **A. Dr. Valerie Johnson**

2 Dr. Johnson is a veterinarian whom plaintiff hired to provide opinions regarding the
3 veterinary care provided to animals at Olympic Game Farm. After reviewing veterinary
4 records from 2010 regarding wolf pups born at Olympic Game Farm, Dr. Johnson
5 provided a supplemental expert report on March 2, 2020. Dr. Johnson states that the
6 treating veterinarian, Dr. Sarah Owens,
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8 Indicated that the puppies were taken from the mother and fed an inadequate
9 diet of meat only which is severely deficient in calcium and other minerals
10 necessary for proper bone formation. The radiographs display severe
11 metabolic bone disease as evidence by the radiolucency of the bone when
12 compared to soft tissue (bone should be white on an xray). In addition
13 multiple pathologic fractures were present. The fractures observed were in
14 both femurs and both tibiotarsal bones at locations not usually observed in
15 traumatic fractures. Additionally, one of the femur fractures exhibited
16 telescoping of the femur which would likely lead to a nonunion (a fracture
17 that doesn't heal) unless the bone was refractured and a technique used to
18 elongate the bone. The disease and fractures evident in the animal were life
19 threatening and I agree with Dr. Owens that it would be surprising if the
20 animal survived. In addition if this animal did survive the orthopedic
21 conformation the wolf would be extremely abnormal with bowed legs and a
very abnormal gait. The records I reviewed did not indicate this animal
received orthopedic treatment. If this animal had received no treatment but
lived this animal would very likely have severe conformation deficits and
crippling lameness.

22 Dkt. # 144 at 168.

23 Defendants do not attempt to show that Dr. Johnson's reading of the radiographs or
24 her causal determination were incorrect or that she lacks the expertise to opine on these
25 matters. Rather, they object on the ground that her predictions about death, deformity, and
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1 lameness have not come true and are therefore unhelpful to the jury. Federal Rule of
 2 Evidence 702 provides that expert testimony is admissible if:

3 (1) the witness is sufficiently qualified as an expert by knowledge, skill,
 4 experience, training, or education; (2) the scientific, technical, or other
 5 specialized knowledge will help the trier of fact to understand the evidence
 6 or to determine a fact in issue; (3) the testimony is based on sufficient facts
 7 or data; (4) the testimony is the product of reliable principles and methods;
 8 and (5) the expert has reliably applied the relevant principles and methods to
 9 the facts of the case.

10 *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014). As construed
 11 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 tasks a district judge with
 12 “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to
 13 the task at hand.” 509 U.S. 579, 597 (1993). Where an expert offers non-scientific
 14 testimony, “reliability depends heavily on the knowledge and experience of the expert,
 15 rather than the methodology or theory behind” the testimony. *Porter v. Martinez*, 64 F.4th
 16 1112, 1127 (9th Cir. 2023) (quoting *Daubert*, 509 U.S. at 594, and *Hangerter v. Provident*
 17 *Life & Acc. Ins. Co.*, 373 F. 3d 998, 1017 (9th Cir. 2004)). The analysis “should be applied
 18 with a ‘liberal thrust’ favoring admission.” *Messick v. Novartis Pharms. Corp.*, 747 F.3d
 19 1193, 1196 (9th Cir. 2014) (quoting *Daubert*, 509 U.S. at 588).

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 21 Ultimately, the test under *Daubert* is not the correctness of the expert’s
 22 conclusions but the soundness of his methodology. The court is a gatekeeper,
 23 not a fact finder. Accordingly, the district court is not tasked with deciding
 24 whether the expert is right or wrong, just whether his testimony has
 25 substance such that it would be helpful to a jury. If the proposed testimony
 26 meets the thresholds of relevance and reliability, its proponent is entitled to
 have the jury decide upon its credibility, rather than the judge. Challenges
 that go to the weight of the evidence are within the province of a fact finder,
 not a trial court judge. A district court should not make credibility

1 determinations that are reserved for the jury. This Court has previously noted
2 that shaky but admissible evidence is to be attacked by cross examination,
3 contrary evidence, and attention to the burden of proof, not exclusion.

4 *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (internal quotation
5 marks, citations, and alterations omitted). “Basically, the judge is supposed to screen the
6 jury from unreliable nonsense opinions, but not exclude opinions merely because they are
7 impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70
8 (9th Cir. 2013).

9
10 In this case, the expert has the knowledge and expertise necessary to develop an
11 opinion whether a particular clinical finding would likely be symptomatic or asymptomatic
12 and whether any manifestations of the finding would be long-lasting. While Dr. Johnson’s
13 methodology – which did not include observing the animal[s] or even inquiring into how
14 the clinical findings actually manifested – is subject to criticism, there are undoubtedly
15 circumstances in which a practitioner can draw conclusions regarding the impacts of
16 clinical findings even in the absence of a physical examination of the patient. Because Dr.
17 Johnson is offering non-scientific testimony, its “reliability depends heavily on the
18 knowledge and experience of the expert, rather than the methodology or theory behind” the
19 testimony. *Porter*, 64 F.4th at 1127. Dr. Johnson’s prognosis, which was based on (a
20 subset of) facts and data and within her area of expertise, cannot fairly be described as
21 unreliable nonsense despite the fact that the wolves did not, in fact, suffer the fate she
22 predicted. Disputes regarding the accuracy of the opinion – and the overall credibility of
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1 Dr. Johnson's testimony -- must be resolved by the jury. Defendants' objection to Dr.
2 Johnson's opinion is overruled.

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4 **B. Dr. Lisa Harrenstien**

5 **1. Animal Husbandry and Veterinary Care**

6 Dr. Harrenstien is a veterinarian with over 30 years of experience and is Board
7 Certified as a Specialist in Zoological Medicine. After visiting Olympic Game Farm on
8 two occasions and reviewing veterinary records, Dr. Harrenstien concluded "that the
9 general husbandry care and also the veterinary care of the animals at OGF has been
10 disturbingly poor" Dkt. # 144 at 233. She then provides a detailed description of her
11 concerns, some of which defendants seek to exclude.
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13 **a. Amadeus**

14
15 Amadeus, a Siberian tiger, died in October 2017. Dr. Harrenstien notes that the
16 animal was described as increasing his volumes of drinking and urine production as early
17 as March 2016, with seizures beginning in early 2017. A seizure in October of that year
18 lasted for thirty minutes and ultimately prompted Amadeus' euthanization. Dr. Harrenstien
19 states that Amadeus suffered respiratory difficulties in addition to excessive drinking,
20 excessive urination, and seizures. She concluded that "[t]his tiger certainly suffered from
21 serious illness for at least the final 1.5 years of his life" and opines that, if defendants were
22 not going to provide veterinary care to address his symptoms, Amadeus should have been
23 euthanized in March 2016 to prevent "needless suffering over the subsequent 1.5 years."
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25 Dkt. # 144 at 238-39.
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1 Defendants object to the testimony that Amadeus suffered on the ground that Dr.
2 Harrenstien never observed or interacted with the animal, nor did she talk with anyone
3 who did. Dr. Harrenstien makes no effort to explain whether or how Amadeus' symptoms,
4 individually or collectively, would be expected to cause pain, discomfort, or suffering. As
5 was the case with Dr. Johnson, however, Dr. Harrenstien has the knowledge, experience,
6 and training to determine whether a constellation of clinical findings and symptoms would
7 be painful and/or cause suffering. While her failure to evaluate Amadeus (or talk with
8 anyone who had observed the animal) is subject to criticism and her opinion is disputed,
9 those issues can be pursued on cross-examination and must be resolved by the jury.
10 Defendants' objection to Dr. Harrenstien's opinion regarding Amadeus is overruled.
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13 **b. Tzar**
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15 Tzar, a tiger, had a seizure in October 2018 and died the next day. Dr. Harrenstien
16 opines that most of the possible causes for seizures can be detected with a physical
17 examination and diagnostic testing. There is no indication that any such examination or
18 diagnostic testing was performed. She then states that, if Tzar were found to have had
19 kidney disease, the condition could have been caused by a long list of things (including
20 exposure to antifreeze, stress, diabetes, age, poor diet, kidney stones, genetic causes,
21 infection, *etc.*). Dkt. # 144 at 240. Dr. Harrenstien does not have an opinion regarding the
22 cause of Tzar's seizure, and she has no reason to suspect either that Tzar suffered from
23 kidney disease or that the cause of the kidney disease was something over which
24 defendants had control (such as exposure to antifreeze or dietary choices) rather than
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1 something outside defendants' control (such as age or genetic causes). Listing the various
2 potential causes of a hypothetical diagnosis would not help the jury resolve any of the
3 issues in this case. This aspect of Dr. Harrenstien's testimony is therefore inadmissible.
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5 **c. Good Mama²**

6 Good Mama was a brown bear who died in September 2019. A full post-mortem
7 examination "showed pathologic fusion of some of her back vertebrae, especially in her
8 lumbar area, which was the result of chronic disease and instability in those vertebrae. The
9 process of back vertebrae joint fusion can involve entrapment of spinal nerves emerging
10 from the vertebrae, which is extremely painful." Dkt. # 144 at 241. Dr. Harrenstien does
11 not, however, opine that Good Mama's spinal nerves were, in fact, entrapped during the
12 fusion process, that entrapment was likely based on the post-mortem findings, or that Good
13 Mama exhibited symptoms of pain consistent with spinal nerve entrapment. In the absence
14 of evidence that Good Mama had entrapment of spinal nerves, Dr. Harrenstien's testimony
15 about the extreme pain caused by that condition is unhelpful and therefore inadmissible.
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18 **2. Duplication**

19 Defendants' argue that plaintiff should be permitted to present expert testimony
20 regarding reptiles, large felids, hybrid wolves, hoofstock, brown bear enclosures, bread and
21 animal nutrition, hay storage, and storage of controlled drugs through either Dr. Johnson or
22 Dr. Harrenstien, but not both. This matter is taken under advisement. Duplicative evidence
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² The name of this animal appears in the record as both "Good Mama" and "Good Mamma."

1 that wastes trial time or is needlessly cumulative will not be admitted pursuant to Fed. R.
2 Ev. 403, but the Court declines to make that determination at this point.

3 4 **3. Second Supplemental Report**

5 On March 21, 2021, Dr. Harrenstien generated a second supplemental report “as an
6 addendum to [her] prior reports based on new information provided” to her, specifically
7 the “February 2021 deposition transcripts of Dr. Michael Briggs, Clay Richmond (OGF
8 animal keeper from 1970’s to October 2019), and James Beebe.” Dkt. # 144 at 281. The
9 supplemental report was served on March 22, 2021, three days before dispositive and
10 *Daubert* motions were due, and three months after the December 16, 2020, deadline for
11 plaintiff to serve supplemental expert reports. Plaintiff argues that the second supplemental
12 report should be deemed timely because it was served within weeks of depositions that
13 “clarified issues that OGF has misrepresented or obscured for over a year: how much bread
14 the bears consume and where bear Samantha was housed while wounded.” Dkt. # 168 at
15 13.

16 Dr. Harrenstien’s supplemental opinions regarding the nutritional and health
17 impacts of feeding bread to brown bears could have and should have been provided by the
18 Court-ordered deadline. Details regarding the quantity of bread fed to brown bears during
19 the tourist season were not necessary to the development of opinions regarding the adverse
20 health impacts of feeding bread to bears. Plaintiff has known that the bears at Olympic
21 Game Farm are fed bread – and that the amount of bread increases during the summer
22 tourist season – since the very beginning of its investigation. *See* Dkt. # 1 at ¶¶ 3, 15, 36,
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1 40, 43, 44, and 82-83. Dr. Harrenstien's opinions that bread is low in calcium and fat,
2 gives rise to health risks such as Lysine and threonine deficiency, and contains high
3 amounts of rapidly-digestible starch are unrelated to the amount of bread ingested, and
4 plaintiff offers no reason why it was not disclosed in a timely manner.
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6 The same cannot be said about Dr. Harrenstien's opinions regarding the impact of
7 defendants' reported practice of reducing the frequency of regular meals, which are
8 primarily meat, during the high tourist season and the inappropriateness of the enclosures
9 in which injured or ill bears are housed for extended periods of time. Those opinions
10 depend on deposition testimony that was not available prior to the supplementation
11 deadline. The Court finds good cause to extend the deadline and will permit these opinions
12 to be presented at trial.
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1 **C. Dr. Jennifer Ward**

2 **1. Quality of Life Opinions**

3 Dr. Ward is a veterinary pathologist who viewed necropsy reports regarding six of
4 defendants' animals. She was a clinical veterinarian for two years before moving into
5 pathology. Dkt. # 144 at 286-87. Defendants do not object to Dr. Ward's analysis of,
6 comments on, and/or disagreements with the gross pathology and histopathology
7 performed by the original pathologists, but they oppose the presentation of opinions
8 regarding the quality of life these animals enjoyed and, in particular, whether they suffered
9 pain before they died.
10

11 **a. Brutus**

12 Dr. Ward examined the physical remains of the wolf Brutus, photographs taken
13 during the original necropsy, radiographs of the remains, recut slides from blocks of tissue
14 submitted for evaluation in the original necropsy, preliminary and final necropsy reports,
15 clinical records, and a summary of the timeline for handling the remains. Dr. Ward's
16 interpretation of the slides and review of the original necropsy report revealed a lesion in
17 the skeletal muscle of Brutus' esophagus. Dkt. # 144 at 291 and 294. She opines that,
18 "[w]hile the esophageal lesion may not have contributed to the death of this wolf directly, I
19 would expect it to have caused pain, and consider it likely that it contributed to a generally
20 debilitated and stressed condition." Dkt. # 144 at 294. She also notes that other conditions
21 that affected Brutus, such as tooth attrition, coxofemoral osteoarthritis, and bilateral
22 cataracts "may have contributed to discomfort and/or diminished quality of life." *Id.*
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1 Defendants do not attempt to show that Dr. Ward's interpretation of the macro and micro
2 evidence presented to her was incorrect or that she lacks the expertise to opine on these
3 matters. Rather, they object on the ground that she never saw Brutus alive, never spoke to
4 anyone at Olympic Game Farm, and never spoke to Brutus' attending veterinarian before
5 speculating that his esophageal lesion caused pain, debilitation, and/or stress. As discussed
6 above, where the expert has the knowledge and expertise necessary to develop an opinion
7 regarding a non-scientific matter, such as whether a particular clinical finding would likely
8 be symptomatic or asymptomatic, this factor weighs heavily in favor of its reliability. Even
9 though Dr. Ward's inability to observe Brutus and failure to inquire whether he manifested
10 symptoms related to the esophageal lesion raise issues regarding her methodology, those
11 issues and defendants' challenges to the accuracy of her opinion must be resolved by the
12 jury. The objection to Dr. Ward's testimony regarding Brutus is overruled.

16 **b. Good Mama**

17 Dr. Ward examined recut slides from blocks of tissue submitted for evaluation
18 during Good Mama's original necropsy, preliminary and final necropsy reports, clinical
19 records, Olympic Game Farm's notes, and chain of custody forms. Defendants do not
20 identify any part of Dr. Ward's commentary regarding Good Mama's necropsy that is
21 objectionable. The only reference to pain in association with Good Mama is the seemingly
22 neutral statement that "[t]he specific impact [of the observed arteriosclerosis and
23 atherosclerosis] in regards to morbidity (i.e., pain, discomfort, decreased exercise
24 tolerance, impaired tissue perfusion, and other impacts on general health, comfort and
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1 quality of life), could not be determined.” Dkt. # 144 at 298. Any objection to Dr. Ward’s
2 testimony regarding Good Mama is overruled.

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4 **c. Tiggers**

5 Dr. Ward examined tissue slides, the original necropsy reports, clinical records, and
6 chain of custody forms with regards to the Siberian tiger named Tiggers. Defendants do
7 not take issue with Dr. Ward’s interpretation of the necropsy results, including her lengthy
8 description of the tissues from Tiggers’ foot pad and uterus and her summary of the gross
9 necropsy findings. They do, however, object to her conclusions regarding how those
10 clinical findings would have manifested prior to Tiggers’ death. Dr. Ward concludes that:

- 12 ▪ given the “invasive malignancy that extended through the uterine wall” coupled
13 with the “abundant necrotic material” described on gross necropsy, “it would be
14 surprising if this did not manifest in a foul smelling vaginal discharge.” Dkt. 144 at
15 310.
- 16 ▪ the necropsy findings “are indicative of chronic and severe renal disease . . . which
17 would have manifested with clinical signs of end stage renal disease.” *Id.*
- 18 ▪ the “very significant pawpad lesion” revealed on histopathology “would be a
19 source of pain if it involved even a single digit,” and there was reason to believe
20 that the condition impacted the majority of Tiggers’ digits. Dkt. # 144 at 311.
- 21 ▪ the finding of amyloidosis in multiple tissues suggests that Tiggers “was
22 chronically ill and would have been visibly declining over a period of years.” *Id.*

23 The fact that Dr. Ward did not examine Tiggers while she was alive or otherwise attempt
24 to confirm her conclusions through the observations of others makes the testimony
25 impeachable, not inadmissible.
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d. Sophie

Dr. Ward examined tissue slides, the original necropsy reports, clinical records, and chain of custody forms with regards to the African lion named Sophie. Defendants do not identify any part of Dr. Ward's commentary regarding Sophie's necropsy that is objectionable. Dr. Ward mentions that Sophie likely showed clinical signs of an underlying pulmonary disease (Dkt. # 144 at 316) and that certain orthopedic issues "may or may not have had a significant impact on her quality of life" (Dkt. # 144 at 318), but there is no opinion regarding ante-mortem pain or suffering. Any objection to Dr. Ward's testimony regarding Sophie is overruled.

e. Marsha

Dr. Ward examined tissue slides, the original necropsy reports, clinical records, and chain of custody forms with regards to the brown bear named Marsha. As was the case with Good Mama and Sophie, defendants do not identify any part of Dr. Ward's commentary regarding Marsha's necropsy that is objectionable. The only reference to pain, suffering, or quality of life in association with Marsha is a summarization of the animal's clinical records, noting that she was prescribed gabapentin for pain approximately six weeks before her death and, on July 22, 2020, Marsha was reported "to be in such pain that [she] could not stand, and was euthanized." Dkt. # 144 at 322. Any objection to Dr. Ward's testimony regarding Marsha is overruled.

f. Tundra

Dr. Ward examined tissue slides, the original necropsy reports, clinical records, and chain of custody forms with regards to the arctic fox named Tundra. Defendants do not identify any part of Dr. Ward's commentary regarding Tundra's necropsy that is objectionable, but most of this part of her report is an elaboration of the findings and interpretations of the original pathologist as it relates "to the suffering of this animal." Dkt. # 144 at 325. Dr. Ward opines that the lower urinary tract disease shown by the macro and micro evidence would have caused pain, suffering, and/or discomfort and that Tundra would have exhibited observable, clinical signs that should have alerted the caregivers that intervention was necessary. Defendants again object that Dr. Ward never saw Tundra alive, never spoke to anyone who had seen him alive, and never spoke to Tundra's attending veterinarian before speculating that the disease caused pain and suffering. As discussed above, an expert's knowledge and expertise is the most important criteria for evaluating the reliability of opinions regarding non-scientific matters, such as whether a particular clinical finding would cause pain and/or observable symptoms. Even though Dr. Ward's inability to observe Tundra and failure to inquire whether he manifested symptoms related to the urinary tract disease raises issues regarding her methodology, those issues and defendants' challenges to the accuracy of her opinions must be resolved by the jury. The objection to Dr. Ward's testimony regarding Tundra is overruled.

2. Duplication

Defendants' argue that Dr. Ward's opinions are duplicative of those which will be offered by Drs. Johnson and Harrenstien. This matter is taken under advisement. On one level, the experts play different roles. Dr. Ward interprets pathology reports, providing a picture of the animals' condition when they died and her opinions regarding the length of time certain disease processes and symptoms affected the animals. Drs. Johnson and Harrenstien use that information to explain how the diseases or conditions manifest ante-mortem and the standard of care in identifying and addressing the conditions. As discussed above, however, Dr. Ward also intends to opine regarding the ante-mortem presentation of the conditions she identified during necropsy. Duplicative evidence that wastes trial time or is needlessly cumulative will not be admitted pursuant to Fed. R. Ev. 403, but the Court declines to exclude any particular testimony at this point.

D. Dr. Sara Owens

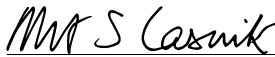
Defendants downplay Dr. Owens' contacts with Olympic Game Farm to argue that she has no basis for her evaluation of its care, husbandry, and housing practices. Dr. Owens was the treating veterinarian for the wolf pups with long-bone fractures discussed above. She fielded a phone call regarding a lion suffering from impaction, receiving information regarding its condition, its environment, and the frequency with which defendants' big cats were impacted. And she visited Olympic Game Farm at least twice, the first time touring the free-range areas, going through the enclosures, and "asking questions about everything." Dkt. # 144 at 406. Dr. Owens has just as much, if not more,

1 familiarity with the Olympic Game Farm operation as Drs. Johnson and Harrenstien.
2 Defendants do not challenge her expertise as a veterinarian, and her interactions provide
3 the facts and data on which her opinions are based.
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5 Defendants also argue that Dr. Owens' opinions are stale - and therefore unhelpful -
6 because they are based on observations and interactions that occurred in 2010. Plaintiff
7 contends that the basics of animal care, veterinary services, and enclosures at Olympic
8 Game Farm has not changed materially in the last 45 years, much less in the last 13 years.
9 If that is not true, it goes to the weight to be given Dr. Owens' testimony, not its
10 admissibility.
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13 For all of the forgoing reasons, defendants' *Daubert* motion is GRANTED as to Dr.
14 Harrenstien's list of the various potential causes of Tzar's hypothetical diagnosis of kidney
15 disease, her testimony about the extreme pain caused by Good Mama's hypothetical nerve
16 entrapment, and her untimely opinions regarding the nutritional and health impacts of
17 feeding bread to brown bears. The Court takes under advisement defendants' objections to
18 duplicative testimony. The motion is DENIED in all other respects.
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22 Dated this 30th day of May, 2023.

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25 Robert S. Lasnik
26 United States District Judge